IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 465 (SS) OF 2004

(Old No. 5228/1988)

Triok Singh Khatri, aged about 48 years, S/o Sri Ratan Singh Khatri, R/o Behind Sharda Factory (Sheesh Mahal), Kathgodam, District Nainital, presently posted as Senior Assistant in the office of the Regional Transport Officer, Kathgodam, District Nainital. .....Petitioners.

Versus

1. State of U.P. through Secretary Transport Department Secretariat, Lucknow.
2. Transport Commissioner, U.P. Tehri Kothi, Lucknow.
3. Additional Transport Commissioner (Admn), Tehri Kothi, Lucknow.
4. Sri K.N. Joshi, Senior Clerk, C/o Regional Transport Officer, Kathgodam, District Nainital.
5. Sri Puran Chand Pandey, Senior Clerk, R.T.O. Office, Kathgodam. .....Respondents.

Ms. Seema Sirohi, Advocate for the petitioner.
Smt. Beena Pandey, Advocate for the State of U.P.

Dated: 29.03.2006

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the impugned order dated 17th June, 1986 contained in Annexure-IV and the order of promotion dated 17th of June, 1988 contained as Annexure No. VIII to the writ petition. Further prayer has been made for a writ of certiorari quashing the order dated 12th April, 1988 contained as Annexure No. VI. Further prayer has been made

for a writ of mandamus directing the respondent to grant notional promotion to the petitioner w.e.f. 17th June, 1988 and grant consequential benefits.

Briefly stated, according to the petitioner, he was initially appointed as temporary Junior Clerk by Order No. 53/II-4-Adm/62 dated 9th January, 1962 in the pay scale of Rs. 60-110 and the appointment was subject to approval of the Deputy Transport Commissioner (Admn) Lucknow. Thereafter on 18th March, 1972, vide order No. 178/Prasha/II-39/72, the petitioner was confirmed on the post of Junior Clerk in the pay scale of Rs. 100-180 w.e.f. 1st of April, 1969 and he continued on the said post. However, he was promoted along with others on the post of Senior Clerk in the pay scale of Rs. 230-385 by order dated 31st July, 1981. In the year, 1985 under the Government Policy the post of Senior Clerk was upgraded as a consequence of which, the scale of pay was also increased and the post was called as “Senior Assistant” and the scale of pay was fixed to Rs. 470-735. The petitioner was also given the scale fo Rs. 470-735 and was called as Senior Assistant.

In the month of June, 1988, the respondent no. 3 vide order No. 289-E/88-224. E/87-88 dated 17th of June, 1988 revered the petitioner to the post of Senior Clerk in the office of the Regional Transport Officer, Kathogadam (Nainital).

The petitioner was required to sit in the said examination as will appear from the letter dated 6th June, 1962 issued by the Department and as such being the departmental directions, the petitioner appeared in the examination and was selected by the Selection Committee.

However, the grievance of the petitioner is that in spite of the fact that he was initially appointed on 9th January, 1962, the respondents no. 4 and 5, who are junior to the petitioner, have been promoted.

The petitioner has referred rules frmaed under U.P. Transport Municipality Rules, 1980. Rule 22 is quoted below:-

"22.(1) The seniority list in respect of each category of posts in the zonal and regional offices hslal be maintained separately and the combined seniority list on statewise basis in respect of posts shall also be maintained at the Headquarter."

(2) Seniority in any category of posts in the service shall be determined from the date of order of substantive appointment and if two or more person are appointed together from the order in which their names are arranged in the appointment-order.

Provided that (1) inter-se seniority of persons directly recruited to the service shall be the same as determined at the time of selection (2) the inter-se seniority of the person appointed in the service by promotion shall be the same as it was in the substantive post held by them at the time of promotion."

The petitioner has submitted that said rules were framed in the year, 1980 and the seniority of the petitioner has already been determined in the year, 1980 and thereafter he got the promotion in the year, 1981 and thereafter, the petitioner was promoted to the post of Senior Clerk in accordance with the Rules. However, by order dated 17th June, 1988, the petitioner has been reverted, but the perusal of said order shows that the petitioner was appointed on 11.01.1962 but since the petitioner has appeared in the examination in the year, 1984 for Senior Clerk and therefore, the seniority cannot be given on the basis of the initial appointment.

A counter affidavit has been filed, where in paragraph 4 it has been stated as under:-

"4. That in reply to contents of paragraph no. 3 of the writ petition, it is stated that the petitioner was confirmed on the post of Junior Clerk vide order dt. 18.3.1972 as has been stated by the petitioner but he was selected in the examination conducted by Dy. Transport Commissioner (Admn) U.P. in the month of February/May, 1964 and he was at Serial No. 90 in the list of selected candidates."

Thus it is evident that the seniority of the petitioner has been accepted from the initial appointment and it has been recognized that the petitioner was confirmed vide order dated 18th March, 1972 and as such appearance in the examination will not deprive the seniority of the petitioner from the initial date of appointment.

Admittedly, the respondents have been appointed after the January, 1962 further order have being passed without affording any opportunity of hearing to the petitioner, therefore, the order is liable to be set aside.

Petitioner has referred the case Basudeo Tiwari V. Sido Kanhu University and others 1998(6) SC -464, where it has been held as:-

"The law is settled that non arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14.It has come to be established, as a further corollary that the audi alteram partem facet of natural justice is also a requirement of Article 14 for, natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against the employee must be fair, just an reasonable which are component of fair treatment. The conferment of absolute power to terminate the services of an employee is antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by the Constitution Bench of this court in Delhi Transport Corporation Vs. DTC, Majdoor Congress reported in JT 1990 SC 725.

In order to impose procedural regards, this Court has read the treatment of natural justice in many equations when the statute is silent on this point. The approach of this court in this regard omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing: "it may be applied from the nature of the power particularly when the right of the party is affected adversely. The justification for reading such a requirement is that the court merely supplies omission of the legislature. (Vide Mohinder Singh Gill and Others Vs. The Chief Election Commissioner and others AIR 1978 SC, 851) and except in case of direct legislative negation or applied exclusion (vide S.L. Kapoor Vs. Jagmohan & Other AIR 1981 SC 136).

In the light of these principles of law, we have to examine the scope of provision under section 35(3) which reads as follows:-

"35(3) any appointment or promotion made contrary to the provisions of the Act, statutes rules, or regulation or in any irregular or unauthorised manner shall be terminated at any time without notice."

"The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorized manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, rules, statutes and regulations or otherwise. In order to arrive at a conclusion that an appointment to the contrary to the provisions, statutes, rules or regulations etc. a findings has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive to such a conclusion necessarily an enquiry will have to be made as to whether such appointments was contrary to the provisions of the act etc. if in a given case such exercise is absent, the condition precedent stands unfulfilled. Arrive at such a finding necessarily enquiry will have to be held and in

holding such an enquiry the person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected is not given notice of such a proceedings and a conclusion is drawn in his absence such a conclusion would not be just fair or reasonable as noticed by this court at DTC Majdoor Sabha's Case. In such an event we have to hold that in the provision there is an implied requirement for hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the act, statute, rules or regulations etc. and it is only on such a conclusion being drawn the services of the person could be terminated without further notice. That is how section 35(3) in this case will have to be read.

Admittedly in this case notice has not been given to the appellant before holding that his appointment is irregular or unauthorized and ordering termination of his service. Hence the impugned order terminating the services of the appellant cannot be sustained."

10. In ***Menka Gandhi v. Union of India, (1978) 1 Supreme Court Cases page 248,*** the Apex Court held as under:-

> "*It is well established that even where there is no specific provision in a statute or rules made there under for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied form the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principal was laid down by this Court in the State of Orissa v. Dr. (Miss) Binapani Dei in the following words:*

the rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its Officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed: it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance; thereof transcends the significance of a decision in any particular case.

In England, the rule was thus expressed by Byles, J. In Cooper v. Wandsworth Board of Works

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (say God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also."

Petitioner has also referred the judgment of the Apex Court in ***Chandra Prakash Sahi Vs. State of U.P. and others, (2000) 5 SCC 152,*** where it has been held that the seniority shall be counter from the date of initial appointment.

In ***Chandra Prakash Sahi Vs. State of U.P. and others, (2000) 5 SCC 152,*** the Apex Court has observed as under:-

"12. Now, it is well settled that the temporary government servants or probationers are as much entitled to the protection of Article 31 (2) of the Constitution as the permanent employees despite the fact that temporary government servants have no right to hold the post and their services are liable to be terminated at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service."

Similar view has been taken in the case of Sunil Kumar, where the Division Bench of the Uttaranchal High Court has held as under:-

A perusal of the order dated 9th January, 1962 shows that the petitioner was appointed in a substantive vacancy. However, the said appointment has further been confirmed on 18th March, 1972. Thereafter, a perusal of the order dated 27th March, 1985 shows that the petitioner has been promoted and the petitioner is shown at Serial No. 63 in the said list.

In view of the aforesaid, the writ petition is allowed. The order dated 17th June, 1988 is quashed. The respondents are directed to give notional promotion to the petitioner. The petitioner shall be entitled for the consequential benefits. There was a stay order in the writ petition, therefore, the petitioner shall continue notionally.

No order as to costs.

(Rajesh Tandon, J.)

29.03.2006
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